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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 431

AGATHA SCHLEIF,

Petitioner,

vs.

MARGARET B. DEFNET, ANNETTE RYAN, ALMA P. ERASMUS, DR. EDGAR J. CRAITE, DR. STEPHAN E. SEBASTIAN, DR. ALBERT F. YOUNG, AND FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Honorable, the Justices of the Supreme Court of the United States:

The motion to reinstate said case was brought on before the Court on July 1st, 1949, in which affidavits and arguments were presented and testimony taken, and the Court denied said motion for reinstatement on July 8th, 1949.

The above named petitioner respectfully prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Wisconsin entered in the above entitled case on the 6th day of June, 1950, motion for re-hearing denied the 6th day of September, 1950.

Opinions Below

The opinion of the Circuit Court for Milwaukee County is reported in the certified record herein (R. 38). The opinion of the Wisconsin Supreme Court (R. 42-44) is reported in 257 Wis. 170.

Jurisdiction

The jurisdiction of this Court is invoked under Article V and Article XIV Section (1) to the Amendments to the Constitution of the United States. In this case the validity of a certain Statute of the State of Wisconsin, to wit: Section 269.25, and a Judgment based on such Statute, is drawn in question upon the ground that such statute and Judgment on its face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, is repugnant to:

(a) Article V and Article XIV Section (1) of the Amendments to the United States Constitution, in that the Wisconsin Statute deprives the petitioner of liberty and property without due process of law.

(b) That the petitioner was deprived of her "day in Court", and was not given the notice and opportunity to be heard in her cause of action at the time said cause of action was up before the Wisconsin Court for dismissal; and the said Court refused or neglected to note that the petitioner was not properly before the Court; and that the notice of dismissal was faultily served, and that she was not given her constitutional right to object to the dismissal, so that she was deprived of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all cases in the State of Wisconsin, was in favor of the validity of the Statute and Judgment.

The Supreme Court of the State of Wisconsin in its opinion specifically stated, "the fact that the plaintiff had no notice when the dismissal action was heard in 1943, was a proper matter for the court to consider".

Nothing in the record indicates that the Trial Court in 1943 did take notice of the fact that the petitioner was improperly served the Notice of Motion for Dismissal. Thus, the Wisconsin Supreme Court in admitting in its opinion that the Trial Court should have properly considered, whether, or not, the petitioner had notice of the dismissal motion still goes on to conclude that in spite of the fact that the Record herein presented, clearly and sufficiently proves that the petitioner did not have such notice in 1943, or at any time, that her action must be dismissed nevertheless.

The Supreme Court in Wisconsin in effect sanctions the dismissal of this valuable cause of action against this petitioner without notice and places her out of Court without any active fault on her part. She is in effect a victim of a judgment by default against her on the part of her former attorney, who had no right to accept service of the dismissal motion in her behalf. She was deprived of this valuable property without due process of law.

A copy of the entire Record in this case as certified to be true and correct by the Clerk of the Wisconsin Supreme Court is hereby furnished and made a part of this application in compliance with Rule 38, Paragraph (1) of the Rules of this Court.

Questions Presented

1. Whether a State may by Statute (269.25 Wisconsin Statutes 1949) dismiss a cause of action without notice to the plaintiff litigant?

2. Is a litigant deprived of her constitutional rights under

Articles V and XIV to the Amendments of the Constitution of the United States, when an action is dismissed as against her by notice of such dismissal given only to a former attorney, who had been mutually released from the case and who in turn failed to notify the petitioner that the motion for dismissal of her cause of action was pending?

3. Did the Trial Court deny the petitioner "due process of law" by dismissing the action when the record before that Court clearly indicated that the petitioner received no notice of the pending dismissal motion?

State and Federal Statutes Involved

The pertinent state statutory provision that the petitioner is contesting is 269.25, which reads as follows:

> "The Court may without notice dismiss any action or proceeding which is not brought to trial within five years after its commencement."

The pertinent federal provisions contained in Article V and Article XIV to the Amendments of the Constitution of the United States, which this petitioner claims she was denied by virtue of the dismissal of her cause of action without notification are those provisions which protect any person from being deprived of their property "without due process of law" contained in the body of Article V and in section 1 of Article XIV.

Statement

The petitioner commenced her cause of action against the respective respondents on the 17th day of August, 1938, by the service of a Summons. Subsequently on November 16, 1938, the complaint was drawn by Attorney Alfred J. Sapiro and served on the respective parties respondents. The complaint duly verified sets forth in detail a cause of

action for malicious prosecution based on the acts of the respective respondents in causing an application to be filed in the District Court for Milwaukee County to inquire into the sanity of the petitioner and alleges specifically the parts each of the respondents played in causing the commitment of this petitioner to the Hospital for Mental Diseases of Milwaukee County on the 21st day of August, 1936.

The petitioner was detained at such mental institution between the 21st day of August, 1936, and the 11th day of November, 1936. She was released on the order of the District Court Judge, who vacated and set aside the Writ of Commitment and rendered the same null and void. This wrongful commitment caused the most serious repercussions in the petitioner's life, which she has not been able to overcome to date. It has caused a cloud of doubt to be cast against her in all of her every day employment and social contacts, and although she was wrongfully committed in the first instance she has never been able to live down the fact that she had been a patient in a mental institution. She has lost several jobs because of this wrongful commitment up to the present time, and it has seriously affected her family life, particularly the doubts, innuendos, and inferences cast against her only son.

Therefore, this cause of action represents to her the most valuable asset in her life, being an attempt to redeem herself socially and in the eyes of her own family, and it is an ever present struggle until the Court of Law gives her the justice she so eagerly desires.

Subsequent to the service of the Summons and to the service and filing of the complaint, there were notices of retainer submitted by counsel for the various respondents, and other pleadings served. Counsel in behalf of the Fidelity and Casualty Company of New York and Dr. Alfred F. Young, caused to have demurrers served in

behalf of their clients. Counsel in behalf of Alma P. Erasmus, one of the respondents, failed to serve any other pleadings, other than a notice of retainer. Counsel in behalf of Margaret B. Defnet, and Annette Ryan served an Answer as did Counsel in behalf of Dr. Edgar J. Craite and Dr. Stephan E. Sebastian.

Up to August 19, 1940, the petitioner relied entirely upon her attorney, Mr. Sapiro. However, it appeared that the case was not moving along to ultimate trial and there was no disposition of it in any way. Up to that time her attorney did not bring on any motion to argue the demurrers that were filed, nor did he even notice this case for trial, as is necessary under Wisconsin Circuit Court Practice. She then conferred with another attorney, one Harold J. Sanville, whose affidavit appears in the Record herein (R. 29-31), who advised her that until such time that she obtained other counsel she should notify the Clerk of the Circuit Court and give the Clerk her address and any other information, so that she could be duly notified by the Clerk of any matter pending in this case. Being a layman, she depended solely upon the advice of counsel and acted in accordance with counsel's advice.

On August 19, 1940, petitioner obtained a consent of withdrawal from Attorney Sapiro, which was filed and became a part of the record herein (R. 16).

On August 16, 1943 petitioner mailed a letter to the Clerk of Circuit Court, advising the Clerk of her address, said letter also being a part of the record herein (R. 16-17).

On November 24, 1943, counsel for the Fidelity and Casualty Company of New York, and Dr. Albert F. Young served a notice of motion for dismissal on Attorney Sapiro, who as aforestated had been released as petitioner's counsel. Said Attorney Sapiro failed to inform the respondents that he could no longer accept service of any pleadings

on his office and he did not inform the petitioner that such notice for dismissal had been served on his office. This petitioner being without notice, actual or constructive, that her case was going to be dismissed on the 3rd day of December, 1943, and Attorney Sapiro making no appearance for the petitioner, the case was ordered dismissed December 3, 1943, and the order was signed December 23, 1943, by Judge Walter Schinz, Circuit Judge, for Milwaukee County. Nothing appears in the record to indicate that Judge Schinz was cognizant of the fact that Attorney Sapiro was served in error with a notice for motion of dismissal, nor that petitioner herself had any actual or constructive notice. She thereupon, without notice, was deprived of this valuable cause of action and her case was thrown out of court without anyone speaking in her behalf.

When present counsel was retained, a motion to reinstate said case was brought on before the Honorable William F. Shaughnessy, Circuit Judge for Milwaukee County, and affidavits and arguments were presented and testimony taken (R. 34-38). Circuit Court denied said motion for reinstatement on July 8, 1949. No reference was made by Judge Shaughnessy to the argument that she had not been properly notified of the motion for dismissal, nor that her previous counsel had accepted service of such notice of motion for dismissal in error. The case was then brought on for Appeal to the Wisconsin Supreme Court and the Order of the Circuit Court of July 8, 1949, was affirmed. No reference was made by the Wisconsin Supreme Court to the fact and argument that the action had originally been dismissed in error before the Honorable Walter Schinz. On motion for re-hearing new briefs and arguments were presented and the Wisconsin Supreme Court again denied petitioner's request for a re-hearing of this cause.

Specification of Errors to Be Urged

The Supreme Court of the State of Wisconsin erred:

1. In that although the petitioner had no notice when the motion was heard in 1943 and the fact of such lack of notice was a proper matter for the Court to consider, that the Trial Court could dismiss the action in 1943.

2. In holding that when the petitioner brought her motion to reinstate the case in 1949 she was in no better position than if no dismissal had been entered, when the question of reinstatement was the only one for the Court in 1949 to determine on the alleged error of the Court in the 1943 hearing.

3. In holding that she could not rely upon her former Attorney, Mr. Sapiro, when she was misled to her prejudice about the motion for dismissal pending when said Attorney Sapiro failed to inform her, the respondents, or the Court that he no longer represented her, and that the motion for dismissal had been served upon him in error, and that she had been denied by such nonfeasance of Attorney Sapiro, "due process of law" and "equal protection of law".

4. In affirming the Order of the Circuit Court of Milwaukee County directing the denial of the reinstatement of the case under Section 269.25 Wisconsin Statutes, when said Statute is unconstitutional in violation of the V and XIV Amendment of the United States Constitution by permitting dismissal without notice.

Reasons for Granting the Writ

Petitioner prays that the Writ be granted for the following reasons:

I

Failure on the part of a former attorney of the petitioner to notify her as to a pending motion of dismissal of hearing action deprives her of due process of law.

This Court has held in *Baker* v. *Humphrey*, 101 U. S. 494, 25 L. Ed. 1065, that an attorney must promptly advise his client when he has information which it is important that the client should receive. This Court has moreover in several other cases relating to the relations between attorney and client held that there is a presumption that notice to an attorney will also be construed as notice to his client, but this presumption will be overcome when it is proved that the attorney acted without authority. *Hill* v. *Mendenhall*, 88 U. S. 453, 21 Wall 453, 22 L. Ed. 616; *Rogers* v. *Palmer*, 102 U. S. 263, 26 L. Ed. 164; *May* v. *LeClaire*, 78 U. S. 217, 11 Wall 217, 20 L. Ed. 50; *Smith* v. *Ayer*, 101 U. S. 320, 25 L. Ed. 955.

This Court has held in specific language that no person has a right to appear as the attorney of another without the authority of that other. *Osborn* v. *Bank of United States*, 22 U. S. 738, 6 L. Ed. 204. This record clearly indicates that the former attorney of the petitioner accepted service, which in effect was an attempted reinstatement of his appearance in the petitioner's behalf, without her authority, after he had been released. Such action on his part was clearly outside of his scope of authority and definitely prejudiced the rights of the petitioner.

The Supreme Court of Wisconsin on page 173 of 257 Wis. 170 states "the fact that the plaintiff had no notice when the dismissal motion was heard in 1943 was a proper matter for the Court to consider. We cannot see any evi-

dence in the Record that the Trial Court failed to do so." Taking the converse of this logic it can also be stated that since it was a proper matter for Circuit Judge Walter J. Schinz in 1943 to consider whether, or not, the plaintiff was notified of the motion for dismissal, there is still no evidence in the Record that the Judge did take notice of the fact that the plaintiff was not properly served.

In other words, if the Supreme Court held that it was a "proper matter" for the Trial Court to consider whether, or not, the petitioner was properly notified, the fact that the Record shows on its face that she was not properly notified indicates that the Trial Court did not properly consider the Record at the time of the motion in 1943.

If the petitioner was denied her rights in 1943, the denial of those rights was still a miscarriage of Justice in 1949, when the second motion was argued, and, therefore, the point was entirely missed by the presiding judge in that motion for reinstatement. The question before the Court in the hearing in 1949 was not whether this case should have been dismissed at that time for alleged unwarranted delay in bringing it to trial, but whether, or not, the Court erred in dismissing it in 1943. Under the laws and the constitutional guarantees of the State of Wisconsin and of the United States each citizen's right to have him properly brought to Court must be upheld. However, this petitioner's case was not properly disposed of in 1943, and because the matter of notification was violated she did not waive, or forfeit any such right in 1949.

The Wisconsin Supreme Court further stated that since Attorney Sapiro had been her attorney for only two years, between 1938 to 1940, she should not have relied upon him to do anything in her behalf after she had caused him to withdraw from the case. However, the Record unequivocally proves that Attorney Sapiro did do something prejudicial to this petitioner's case after three years of

his withdrawal, by causing and permitting service to be made upon his office, and by such admission of service did cause the dismissal of her cause of action. It is this petitioner's contention that any attorney as an officer of the Court, although he may not technically owe any duty to a client after once he has been released from the case, still owes a duty to the Courts and to the respective defendants, and in fact to a previous client, by informing all concerned of his true and correct status in any case, and that he cannot by nonfeasance disregard any legal matter in which he may have had at one time taken an active part, if such act of disregard did prejudice the rights of his former client, or of any party to the action. With the high degree of responsibility and duty placed upon any member of the bar, it is fallacious to argue that a lawyer should not be obliged to take positive action where such inaction might possibly lead itself to criticism of his professional duty as an officer of the Court and of the Court itself. This petitioner, as any layman, not versed in the technicalities of legal procedure should not be penalized for an overt act taken by her former attorney in admitting service on papers in her behalf without her knowing the consequence of such admission of service.

II

Section 269.25 and the judgment is in violation of V and XIV Amendments to the Constitution in that they deprive petitioner of property without "due process of law" and "equal protection of the law".

The essential elements of due process of law are *notice* and *an opportunity to be heard.* Procedure or legislative acts which deny any citizen such notice, or opportunity, to be heard have been considered as denying litigants due process of law.

The question whether a proceeding is "due process of law", within the meaning of the Constitution is independent of the question, whether it was by a motion or ordinary action, provided the form sanctioned by the State law gives notice and an opportunity to be heard. *Iowa Cent. Ry. Co.* v. *Iowa*, 16 S. Ct. 344, 160 U. S. 389, 40 L. Ed. 467.

Due process of law as applied to proceedings under a Statute resulting in judgment means notice directed by the Statute itself, and not a voluntary or gratuitous notice resting in form of discretion. *U. S. C. A. Const. Amend., 14 Wilmington Trust Co.* v. *Baldwin*, 195 A 287, 293; *Webb Packing Co.* v. *Harmon*, 196 A 158, 162.

Section 269.25 does not meet the requirements of the holding of the latter case. Since notice is ruled out in the Statute it leaves the disposition of the case solely to the discretion of the Court. Thus, the law in itself denies the litigant the fundamental rights under the Constitutional Amendments and where such laws are in conflict with the Constitution they are void laws. If 269.25 is ruled void, the basis of dismissal of this action in 1943 is void and the case must be reinstated. The long and almost limitless line of cases in the federal and state jurisdiction on "due process of law" make it a prerequisite that notice and an opportunity to be heard is essential. In the face of this overwhelming authority Section 269.25 is clearly unconstitutional. Any law, which by its own inherent force extinguishes rights or life, liberty, or property or compels their extinction without any legal notice, comes directly in conflict with the Constitution.

In the early decisions of this Court the dismissal of actions for want of prosecution were not readily encouraged without sufficient reason, or previous neglect being shown. *Schlosser* v. *Lesher*, 1 U. S. 251, 1 L. Ed. 123; *Todd* v. *Thompson*, 2 U. S. 105, 1 L. Ed. 309; *Halhead* v. *Ross*, 1 U. S. 405; *McKegg* v. *Crawford*, 1 U. S. 347, 1 L. Ed. 169. An-

other Federal case, *Overholt* v. *Matthews*, 48 App. D. C. 482, the Court held even a delay of ten years in the prosecution of a suit for fraud, where none of the parties thereto were in any way prejudiced by the delay, should not be dismissed.

In *Russell* v. *Texas Transport & Terminal Co.*, 32 F. 2nd 689, the Court held that a delay of even eight years in prosecuting a suit under the circumstances was not so unreasonable as to justify dismissal. In *Zielenski* v. *United States*, 102 F. 2nd 469, the Court permitted the restoration of an action that had been dismissed, where an attorney for a widow suing on a war risk policy was disbarred by no notice to her to appoint another attorney as required by the New York Statute was given. Thus, the Court held that the placing of the case on the calendar by the Clerk and the dismissal thereof for want of prosecution and without notice to the widow, or any attorney, authorized to represent her as required by Court rule was improper.

All of the foregoing cases show a trend in the Federal Courts to give due consideration to cases brought on for dismissal for want of prosecution, where reasonable and plausible reasons for the delay are presented, and a tendency on the part of the Courts to deny dismissal of such actions, or even to reinstate such actions, even though the delay may be as much as eight to ten years.

This petitioner testified on the motion for reinstatement various reasons why her action was not brought on for trial at an earlier date, among which was the fact that she was a war worker. This and other reasons were not deemed sufficient by either the Trial Court, or the Wisconsin Supreme Court, although in due deference to the petitioner they should have been.

Conclusion

The petitioner submits that she is entitled to a Writ of Certiorari on the basis of the Record in this case, which clearly and unequivocally shows:

(1) That she has suffered an extreme personal loss of a valuable cause of action by the prejudicial act of the acceptance of the admission of service on the notice of motion for dismissal by an attorney, who had no authority to represent her.

(2) By the Trial Court in 1943 failing to recognize and study the Record that she was not properly notified, or represented in Court, when the notice of motion for dismissal was argued, and was, therefore, deprived of her property without due process of law.

(3) By the Supreme Court of Wisconsin failing to reverse the orders of the lower courts dismissing the action in the first instance without notice and in not reinstating the dismissed action in the second instance, and that her constitutional rights were not considered by the appellate court. This case, therefore, is of profound importance not only to this petitioner, who has lost a valuable property right to redeem her character and reputation, but to all citizens of this country generally, who might find themselves in the same, or similar circumstances, having their cases thrown out of court by capricious or negligent acts of counsel, and a failure of Trial Courts to properly study the Record at the time such action for dismissal are brought before them. In view of the fact that such causes of action, such as the one contained herein goes to the very essence of the protection of the rights and dignities of a human being, and is subject to a limited Statute of Limitations for the bringing of such causes of action, makes it doubly important that the rights of such litigant be protected and that his cause be not squandered in vain.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALEXANDER LAKES,
Counsel for Petitioner.

ARTHUR W. RICHTER,
Of Counsel.

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